Supreme Court, U.S.
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No. 97-956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LUFTHANSA GERMAN AIRLINES,

Petitioner,

vs.

LEONARD KRYS AND REBECCA KRYS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN N. ROMANS
Counsel of Record
BIEDERMANN, HOENIG,
MASSAMILLO & RUFF, P.C.
90 Park Avenue
New York, New York 10016
(212) 697-6555

Counsel for Petitioner
Lufthansa German Airlines

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SUPPLEMENTAL BRIEF ENCLOSING NEW DECISION IN DIRECT CONFLICT

Petitioner, Lufthansa German Airlines, ("Lufthansa"), respectfully submits this supplemental brief pursuant to Rule 15.8 to bring to the Court's attention *Fischman v. Delta Air Lines, Inc.* 1998 W.L.1418 (2d Cir. Jan. 5, 1998), which is annexed as Appendix A and is in direct conflict with the decision of the Eleventh Circuit below.

THE DECISIONS OF THE SECOND CIRCUIT AND THE NEW YORK COURT OF APPEALS DIRECTLY CONFLICT WITH THOSE OF THE THIRD CIRCUIT AND THE ELEVENTH CIRCUIT BELOW.

The decisions of the Eleventh Circuit below and the Third Circuit in *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130 (3rd Cir. 1984) directly conflict with the decision of the highest court of New York in *Seguritan v. Northwest Airlines, Inc.*, 86 A.D.2d 658, 446 N.Y.S.2d 397 (2d Dep't), *aff'd mem*, 57 N.Y.2d 767, 454 N.Y.S.2d 991, 440 N.E.2d 1339 (1982) and that of the Second Circuit in *Fischman v. Delta Air Lines, Inc.*, 1998 W.L. 1418 (2d Cir. Jan. 5, 1998).

In Fischman, a two year old child "began crying and touching her ear" while the plane was descending (A-2). "The child, who had a cold, was evidentially suffering from the change of air pressure." *Id.* A flight attendant suggested to the child's mother "that a cup containing a warm cloth be placed over the ear." *Id.* When the cup was applied, "scalding water in the cup dripped on the child's neck and shoulder, causing burns." *Id.*

The Second Circuit, citing *Air France v. Saks*, 470 U.S. 392, 406 (1985), noted: "It is enough if in the chain of causation there is 'some link' that was an unusual or unexpected event external to the passenger" (A-4).

Under similar circumstances, the New York Court of Appeals had affirmed in *Seguritan* that the "'accident' is not the heart attack." "Rather, it is the alleged aggravation of

decedent's condition by the negligent failure" of the crew. The Second Circuit in *Fischman* held that "the injury here is not the earache, but the application of scalding water to treat it" (A-5). Petitioners submit in this case that the "accident" was not the heart attack, but the negligence of the Lufthansa crew in not making an emergency landing. In the words of the *Fischman* court (A-7):

> [A] claim does allege an "accident" if it arises from some inappropriate or unintended happenstance in the operation of the aircraft or airline. Thus, an injury resulting from routine procedures in the operation of an aircraft or airline can be an "accident" if those procedures or operations are carried out in an unreasonable manner.
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> The application of a hot compress to [the child's] ear may have been a routine measure for relieving the pain suffered by passengers incident to the decent of the aircraft; but the measure was carried out in a way (using excessive scalding water) that was not expected, usual, normal, or routine.

The Eleventh Circuit below found that the Lufthansa crew was negligent in its care of Mr. Krys after his heart attack, and that Lufthansa's negligence proximately caused an aggravation of the injury to Krys' heart wall; yet the Eleventh Circuit found no "accident." The Third Circuit ruled the same way in *Abramson.* In direct conflict, the Second Circuit in *Fischman* and the New York Court of Appeals in *Seguritan* held that these facts, as a matter of Federal law, did constitute an "accident."

CONCLUSION

Certiorari should be granted to resolve a widening conflict among the circuits concerning this recurring issue of treaty interpretation.

Respectfully submitted,

JOHN N. ROMANS
Counsel of Record
BIEDERMANN, HOENIG, MASSAMILLO
& RUFF, P.C.
90 Park Avenue, 36th Floor
New York, New York 10016
(212) 697-6555

Counsel for Petitioner,
Lufthansa German Airlines

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